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NO. 20130

IN THE
UNITED STATES
COURT OF APPEALS
For the Ninth Circuit

UNITED PACIFIC INSURANCE COMPANY, et al,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee,

APPELLANTS' PETITION FOR REHEARING

DETELS, DRAPER & MARINKOVICH
JONES, GREY, KEHOE, HOOPER & OLSEN
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PETITION FOR REHEARING

COME NOW United Pacific Insurance Company, et al, appellants in Docket No. 20130, herein, "Private Cargo", and, pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, respectfully petition this Court for rehearing of their appeal.¹

Judgment affirming the decree of the United States District Court was entered September 27, 1966.

Rehearing is requested upon the following grounds:

1. This Court (and the District Court) erred in failing to give proper effect to the stipulation of Private Cargo and the appellee United States that the vessel ISLAND MAIL struck the 3.5 rock and this Court erred in sustaining the District Court's clearly erroneous finding that, at the time it was struck by ISLAND MAIL the 3.5 rock extended only 18 feet above the bottom.

2. This Court erred in sustaining the District Court's clearly erroneous finding that the SS CHARLES CROCKER struck, not the 3.5 rock, but a never-located rock in a general area about .27 miles easterly of that rock.

STATEMENT OF GROUNDS

1. Failure to Give Effect to Stipulation

Private Cargo and the appellee Government stipulated that ISLAND MAIL struck the 3.5 rock. Private Cargo was thus precluded from introducing evidence to prove this admitted fact.

The evidence was undisputed that the top of the rock, as it stood when located by appellee's divers, was 27.4 feet below the water surface (at the + 5.4' tide), and that the point of im-

1. Rehearing is not sought by Private Cargo in the companion case of *In Re American Mail Line, Ltd.*, Docket No. 20120, with which the instant case was consolidated for trial and appeal.

pact on ISLAND MAIL (based on her stationary draft) was 21 feet 8.64 inches below the surface.

Thus the stipulated fact of contact between ISLAND MAIL and 3.5 rock was an impossibility, unless explained by evidence. Private Cargo and Government advanced competing contentions to close this gap of 5 feet 7 inches—Private Cargo that at the time of impact with ISLAND MAIL, the rock stood in a different attitude, with its top 19.4 feet below the surface, and that it was rolled by the impact—and the Government that the phenomenon of squat or sinkage deepened the draft of ISLAND MAIL sufficiently to bring vessel into contact with rock.

Each party introduced evidence attempting to support its proffered explanation.

The District Court found that the Government's evidence did not account for the difference (Oral Opinion, F.F. 43, Tr. 1136).

The District Court stated that Private Cargo's contention was "the most probable possibility" (Ibid, Tr. 1138) and "convincing and plausible" (Ibid, Tr. 1143). This Court states:

"If the trial court had found, on the basis of its own evaluation of the evidence, that the ISLAND MAIL struck the 3.5 rock, then Private Cargo's theory of how this occurred would be *most compelling*." (Opinion, page 6—emphasis supplied).

This Court excuses the District Court's failure to find that the 3.5 rock was pushed over by stating that the District Court was "precluded" by the stipulation of Private Cargo and Government "from making an independent determination of whether the ISLAND MAIL struck the 3.5 rock . . ." (Opinion, page 6).

In the circumstances here presented the District Court's finding that the ISLAND MAIL did not roll the rock is, in practical and legal effect, a finding that at the time of impact with the ISLAND MAIL, the top of the rock was 27.4 feet below the surface—and represents an election to find a fact "not

account(ed) for” by the Government’s evidence, in preference to the finding urged by Private Cargo, which the District Court conceded to be the “most probable possibility,” and which this Court says “would be most compelling” if the District Court had found the fact that the ISLAND MAIL struck the 3.5 rock, independently of the stipulation between Private Cargo and Government.

We know of no principle which differentiates between a fact stipulated by the parties (and found by the trial court, based on such stipulation) and a fact found by the trial court, independently of stipulation, or which authorizes a finding—in this case—an implied finding—which is not accounted for by the evidence, in preference to a finding for which the evidence is “most compelling”.

The prior decisions of the Supreme Court, of this Court, and of the Courts of other Circuits are uniform in holding that stipulations of fact are binding upon parties thereto, and courts, trial and appellate.

In *Hackfeld v. U. S.*, 197 U.S. 442 (1905) the Supreme Court reversed a decision of this Court (125 Fed. 596) because of this Court’s failure to give effect to a stipulation of fact, stating at 447: . . . the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record, were established, no less than the specific facts recited.”

In *Berry v. C.I.R.*, 254 F2d 471 (9th Cir. 1957) this Court stated (at 474):

“ . . . a *stipulation* by counsel, especially if in writing, *establishes the facts absolutely. Of a certainty it cannot be disregarded.*” (emphasis supplied)

It therefore reversed a Tax Court decision based upon a finding of fact which disregarded such a stipulation.

In *Ringling Bros. v. Olvera*, 119 F.2d 584 (9th Cir. 1941) the parties had stipulated that a contract of employment had been made in Florida. Evidence at trial indicated that it had been made in Texas. This Court held the stipulation binding,

and, applying Florida law, reversed the decision of the trial court.

In *Gray Line v. Goodyear*, 280 F2d 294 (9th Cir. 1960) this Court again adhered to the rule that stipulations of fact are binding.

We respectfully suggest that the proposition adopted by the Court's opinion herein—that a fact stipulated by the parties is entitled to “lip-service” only; that a stipulated fact may receive lesser consideration than a finding of the trier of fact based upon disputed evidence; and that inferences from such fact and other evidence which would be “compelled” if the trier of fact had found the initial fact need not be drawn if the initial fact is “merely” stipulated—is not only in conflict with prior decisions of this Court, and the Supreme Court, but would dictate to counsel that no fact, however undisputed, could be safely stipulated in the future.

2. The CROCKER struck the 3.5 Rock

The keystone of the Court's opinion affirming the District Court's finding that Government negligence was not a proximate cause of ISLAND MAIL's grounding is its approval of the District Court's disregard of the stipulation that ISLAND MAIL struck the 3.5 rock.

The Court did, however, without discussion, hold that the District Court did not err in finding that the SS CHARLES CROCKER struck a never-located rock .27 miles east of the 3.5 rock.

Once the error in failing to find that the 3.5 rock was rolled is corrected, that rock is positioned at a height which corresponds to the damage to the CROCKER, and the 3.5 rock becomes not only the sole candidate for the CROCKER casualty, but one with the most clear and convincing credentials.

Appellants respectfully submit that the scope of appellate review authorized by *Guzman v. Pichirillo*, 369 U.S. 698 (1962) encompasses reversal of the finding in question.

In brief, the evidence on this issue was as follows:

1. An exhaustive Government search, including diving, hydrography and wire-dragging has never located any candidate rock for the CROCKER striking, other than the 3.5 rock.

2. The Government, in possession of all evidence which the District Court received as to CROCKER'S navigation, charted the CROCKER casualty approximately .23 miles *west, not east*, of the later-discovered 3.5 rock.

3. The testimony upon which the District Court apparently relied, Edmonston's comparison of the CROCKER's fathometer soundings with the hydrographic data, was not even offered by the Government, but was elicited by the District Court. At most, Edmonston testified that the hydrography off South Island was more consistent with the CROCKER's soundings at a distance of 1.6 miles west of the Light than further west, but he testified that, on a course track near the 3.5 rock, the hydrography was "not too inconsistent".

This testimony was insufficient to justify rejection of all other evidence on the issue and validate a finding that the CROCKER struck a never-found, never-charted rock in this exhaustively-searched and now carefully charted area.

Respectfully submitted,

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